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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1994

EARTH ISLAND INSTITUTE, MARINE MAMMAL FUND and DAVID R. BROWER,
*Petitioners*,

vs.

RONALD H. BROWN, Secretary of Commerce; D. JAMES BAKER, Administrator of the National Oceanic and Atmospheric Administration; ROLLAND A. SCHMITTEN, Assistant Administrator of the National Marine Fisheries Service; and LLOYD E. BENTSEN, Secretary of the Treasury,
*Respondents*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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39 pp

## QUESTION PRESENTED

Does 28 U.S.C. § 1581(i)(3) deprive the federal district courts of jurisdiction to construe and enforce provisions of environmental protection statutes such as the Marine Mammal Protection Act, 16 U.S.C. §§ 1361 *et seq.*, that impose conditions on certain imports as one part of a comprehensive program to remedy a problem (the protection of dolphins and the marine ecosystems) unrelated to international trade?

## PARTIES

Pursuant to Rule 29.1, petitioners disclose that none of them has any parent or subsidiary companies. The parties to this petition are as stated in the caption.

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*Respondents*.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## PETITION FOR WRIT OF CERTIORARI

Petitioners Earth Island Institute, Marine Mammal Fund and David R. Brower (collectively, "Earth Island") respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit on an important issue concerning the subject matter jurisdiction of the federal district courts, as well as the scope of the exclusive jurisdiction of the Court of International Trade ("CIT") under 28 U.S.C. § 1581(i)(3). The Court of Appeals' decision was wrong because, among other reasons, it conflicts with this Court's opinion in *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176 (1988).

## OPINIONS BELOW

The February 3, 1992 decision of the United States District Court for the Northern District of California is reported at 785 F. Supp. 826 and is reprinted in Appendix A in the separately bound appendix to this petition (cited "Pet. App."), Pet. App. at A-1 through A-18.[1] The United States Court of Appeals for the Ninth Circuit issued an opinion in this matter on March 3, 1994, which was reported at 17 F.3d 1241. Following a timely petition for rehearing with suggestion for rehearing *en banc*, the Court of Appeals withdrew its March 3, 1994 opinion on June 28, 1994. The June 28, 1994 amended opinion of the United States Court of Appeals for the Ninth Circuit is reported at 28 F.3d 76 and is reprinted in Appendix B to this petition, Pet. App. at B-1 through B-8.

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[1]As set forth in that decision, the February 3, 1992 Order superseded prior orders of the District Court dated January 10 and January 27, 1992. Neither of these superseded orders is included in the appendix.

## JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was rendered on June 28, 1994. By Order dated August 1, 1994, the Court of Appeals denied Earth Island's petition for rehearing and suggestion for rehearing *en banc*, as of July 5, 1994. A copy of that Order is reprinted in Appendix C to this petition, Pet. App. at C-1 through C-2. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

This petition relates to the federal district courts' jurisdiction to construe and enforce various provisions of the Marine Mammal Protection Act, codified as amended at 16 U.S.C. §§ 1361-1421h (the "MMPA"). Most particularly in issue here are the MMPA-imposed conditions, codified as amended at 16 U.S.C. § 1371(a)(2)(C), on the importation of yellowfin tuna from so-called intermediary nations.[2] Section 1371(a) provides, in pertinent part:

**§ 1371. Moratorium on taking and importing marine mammals and marine mammal products**

**(a) Imposition; exceptions**

. . .

---

[2]Since the District Court's decision on conditions on importation of tuna from intermediary nations, Congress has amended certain provisions of the MMPA, including Section 1371(a)(2)(C). International Dolphin Conservation Act of 1992, Pub. L. No. 102-523, 106 Stat. 3425 *et seq.* (1992) (the "IDCA"). The 1992 amendments do not affect the jurisdiction question presented here. For the Court's convenience, relevant portions of the MMPA as amended are reproduced in Appendix D to this petition, Pet. App. at D-1 through D-30.

(2) Marine mammals may be taken incidentally in the course of commercial fishing operations and permits may issue therefor under section 1374 of this title subject to regulations prescribed by the Secretary in accordance with section 1373 of this title. In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching zero mortality and serious injury rate; provided that this goal shall be satisfied in the case of the incidental taking of marine mammals in the course of purse seine fishing for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable. The Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. For the purposes of applying the preceding sentence, the Secretary --

. . .

(C) shall require the government of any intermediary nation to certify and provide reasonable proof that it has not imported, within the preceding six months, any yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation to the United States under subparagraph (B).

. . .

Also in issue in this petition are two statutes governing the subject matter jurisdiction of the federal courts. The first is 28 U.S.C. § 1331, which provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

The second is 28 U.S.C. § 1581(i), which provides, in pertinent part:

> [T]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for --
>
> . . .
>
> (3) embargoes or other quantitative restrictions on importation of merchandise for reasons other than the protection of the public health or safety; . . . .

## STATEMENT OF THE CASE

Earth Island commenced this action in 1988 to compel various agencies of the federal government to enforce MMPA provisions that Congress enacted to limit the incidental killing and injury of dolphins by "purse seine" tuna fishing fleets in the Eastern Tropical Pacific Ocean (the "ETP"). For reasons that are not altogether understood, schools of yellowfin tuna in the ETP tend to aggregate in the water just below schools of dolphins. Tuna fishing fleets in the ETP historically have exploited this phenomenon, seeking out, or, in the industry's jargon "fishing on" or "setting on," schools of dolphins in an effort to maximize their yellowfin tuna catch. Once the schools are spotted, tuna fishing boats then deploy, or set, huge nets called purse seines and encircle the dolphin schools. After the schools are encircled, the top of the net is pulled tight, closing like a drawstring purse around the tuna, but also around the dolphins. The mammals caught in the purse seines are often killed or seriously injured because they are unable to surface to breathe air, and try mightily to free themselves to avoid suffocation.

Dolphins are highly intelligent and peaceful creatures, whose brain size and capacity for social interactions are comparable to humans'. Unfortunately, the commercial tuna

industry has killed more than six million dolphins since the advent of purse seining in the 1960s. Predictably, dolphin populations have suffered serious declines as a result; today many dolphin species have been listed as "depleted" within the meaning of the MMPA. *See* 16 U.S.C. §§ 1362(1), (8) & (10).

**A. The MMPA.**

Beginning with the original passage of the MMPA in 1972, Congress has expressed concern over the dramatic impact that purse seine fishing has had on dolphin populations, and on the implications for the ecosystem generally of diminished dolphin populations and the extinction of several dolphin species. *See generally* 16 U.S.C. § 1361 (congressional findings and policy statement). The MMPA and its implementing regulations direct a wide range of actions and prohibitions designed to protect marine mammals.[3] As originally enacted, the MMPA focused primarily on standards for domestic tuna fishing operations, with the express purpose of reducing the killing of marine mammals "to insignificant levels approaching a zero mortality and serious injury rate." 16 U.S.C. § 1371(a).

---

[3]For example, different MMPA provisions require studies of dolphin populations, 16 U.S.C. §§ 1373(f), 1414(a)(4); mandate certified observers onboard domestic vessels fishing in the ETP, *id.* § 1374(h)(2)(B)(viii); fund research on alternative fishing techniques, *id.* §§ 1380, 1374(h)(2)(B)(v); ban sets at or around sunset, *id.* §§ 1371(a)(2)(B)(ii)(I), 1374(h)(2)(B)(iv); prohibit using certain explosives for fishing, *id.* § 1374(h)(2)(B)(vii); and require harvesting nations to adopt regulatory programs to achieve dolphin mortality rates that are comparable to those of the U.S. tuna fishing fleet as a condition to importing yellowfin tuna into this country, *id.* § 1371(a)(2)(B).

Controls on the domestic fishing fleet proved insufficient to end the dolphin slaughter.[4] Notwithstanding the MMPA's protections, millions of dolphins in the ETP continued to be killed by purse seine tuna fishing operations, increasingly at the hands of foreign fishing vessels. *See* 16 U.S.C. § 1411(a) (congressional findings supporting the IDCA). Accordingly, Congress amended the MMPA in 1984, Pub. L. No. 98-364, 98 Stat. 440 *et seq.*; in 1988, Pub. L. No. 100-711, 102 Stat. 4765 *et seq.*; and again in 1992 with the IDCA, Pub. L. No. 102-523, 106 Stat. 3425, to add, and progressively to limit NMFS' discretion in the implementation of, provisions conditioning the importation into this country of yellowfin tuna on foreign fishing fleets' compliance with U.S. fishing standards.

Among these provisions is Section 1371(a)(2)(C), the MMPA provision considered by the Court of Appeals in this appeal. Section 1371(a)(2)(C) prohibits the transshipment through intermediary nations of tuna caught on dolphins by countries not complying with U.S. standards. To ensure that tuna that could not be imported to this country directly under Section 1371(a)(2)(B) is not imported to the United States indirectly, Section 1371(a)(2)(C) conditions the importation of

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[4]In part, this was owing to virtual non-enforcement of the MMPA by the federal agencies, including the National Marine Fisheries Service ("NMFS"), charged with doing so. The government's ongoing disregard for the dolphin-tuna law -- a disregard that the Court of Appeals recognized and condemned in a previous opinion in this lawsuit, *see Earth Island Institute v. Mosbacher*, 929 F.2d 1449, 1453 (9th Cir. 1991), *aff'g* 746 F. Supp. 964 (N.D. Cal. 1990) -- was the reason Earth Island was forced to bring this action.

yellowfin tuna from intermediary nations upon the receipt of certain certifications from the intermediary nation's government.[5]

**B. The Litigation.**

As mentioned, Earth Island has been prosecuting this case now for six years, seeking court intervention to require the government, primarily through NMFS, to enforce the numerous mandates of the MMPA that the agency has ignored. Provision by provision, the District Court has directed NMFS to do what the plain language of the MMPA requires[6] -- language that the

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[5]Under the current version of Section 1371(a)(2)(C), the intermediary nation must certify that it has not, in the past six months, imported yellowfin tuna or tuna products that could not have been imported into the United States directly by the country of origin. This differs somewhat from the certifications that were required before the IDCA was enacted.

[6]Earth Island has obtained injunctions: (1) requiring that all U.S.-certificated tuna vessels fishing within the ETP carry a certified observer on board to monitor fishing operations (Order of Jan. 18, 1989); (2) prohibiting the Secretary of Commerce from certifying that a foreign nation's fishing practices are comparable to those of the United States unless and until the Secretary makes positive findings that the incidental taking of dolphins by vessels of those foreign nations is no more than twice that of U.S. vessels during the same period (Order of Aug. 28, 1990); (3) requiring that the agency's kill calculations for eastern spinner dolphins be based upon an entire fishing season (Order of Oct. 19, 1990, published at 746 F. Supp. 964 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991)); (4) requiring any nation seeking to export tuna to the United States to demonstrate that its dolphin kill rate is no more than 1.25 times that of the U.S. fleet (Order of Mar. 26, 1991); (5) prohibiting the importation of yellowfin tuna absent satisfaction of certain preconditions (Order of Feb. 3, 1992 and the subject of this petition); and (6) prohibiting any vessel in the U.S. fleet from setting nets on the

agency simply and unlawfully disregarded in the absence of these court directives.[7] Most of the injunctions issued by the District Court now have become final injunctions, but several matters, including the import conditions on intermediary nations in issue here and prohibitions on tuna fishing on certain dolphin species that are depleted, *e.g.*, 16 U.S.C. § 1371(a)(3)(B), remain unresolved.

**C. Proceedings Relating to This Petition.**

In late 1991, Earth Island filed a motion with the District Court for entry of a preliminary injunction barring the importation of tuna through intermediary nations in violation of 16 U.S.C. § 1371(a)(2)(C). After full briefing and argument, the District Court, on February 3, 1992, issued the Order that

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depleted offshore spotted dolphin (Order of Jan. 27, 1994, *appeal pending*, No. 94-15602 (9th Cir.)).

[7]Repeatedly, the District Court and the Court of Appeals have chastised the agency for failing to enforce the MMPA, and thereby forcing petitioners to monitor NMFS' enforcement activities closely and to prosecute their serial requests for injunctive relief when NMFS failed properly to enforce the law and negotiation with the agency did not remedy the problem. For example, in an earlier appeal in this case, the Court of Appeals noted "the agency's own record of non-enforcement of congressional directives," and concluded that "the government's position is at odds with both the language and the purpose of the MMPA, and the agency's intended role under it . . . ." *Earth Island Institute v. Mosbacher*, 929 F.2d 1449, 1453 (9th Cir. 1991). Similarly, the District Court has held several times that the agency simply has ignored the plain language of the MMPA. *E.g.*, Order of Aug. 28, 1990 ("Congress clearly intended the statutory scheme it established to reduce unnecessary dolphin deaths. The Secretary of Commerce's failure to enforce the statute's clear requirements interferes with this scheme, and therefore assures the continued slaughter of dolphins.").

is the subject of this appeal, enjoining the government from "permitting the importation" of yellowfin tuna and tuna products from an intermediary nation "until" the government obtains certification and proof that the intermediary nation did not obtain the tuna from countries that engage in fishing practices prohibited by the MMPA. Pet. App. at A-1 through A-18.[8]

The government asked the District Court to stay its February 3, 1992 Order, arguing, among other things, that the import restrictions would interfere with unspecified foreign policy objectives of this country. In connection with its stay request, the government also argued for the first time (and almost four years into the litigation) that the District Court lacked jurisdiction to enter the injunction. Under 28 U.S.C. § 1581(i)(3), the government argued, questions concerning enforcement of Section 1371(a)(2)(C) were within the exclusive jurisdiction of the CIT. The District Court denied the stay, as did the Court of Appeals when the government renewed its motion there.

After merits briefing and oral argument, the Court of Appeals vacated the District Court's Order, concluding that Section 1371(a)(2)(C)'s import limitations constitute an "embargo" on imports of yellowfin tuna from intermediary nations within the meaning of 28 U.S.C. § 1581(i)(3). As such,

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[8]As mentioned, *supra* note 6, an injunction requiring the government to enforce restrictions on the direct importation of yellowfin tuna caught by foreign fleets pursuant to 16 U.S.C. § 1371(a)(2)(B) was previously entered by the District Court, *see Earth Island Institute v. Mosbacher*, 746 F. Supp. 964 (N.D. Cal. 1990), and affirmed by the Court of Appeals, 929 F.2d 1449 (9th Cir. 1991). Following the Court of Appeals' affirmance of that preliminary injunction, the government stipulated to entry of a permanent injunction on identical terms.

the Court of Appeals held that construction of the provision is within the CIT's exclusive jurisdiction.[9]

The District Court's February 3, 1992 Order also has led to litigation outside of the courts of the United States. First Mexico, and later the European Community, challenged the propriety of enforcing the MMPA's import conditions (pursuant to the District Court's injunction) before dispute panels of the General Agreement on Tariffs and Trade ("GATT"). In two decisions that have sparked vigorous discussion on issues of trade versus the environment, the GATT panels ruled that the MMPA provision at issue here was GATT-violative. *See* Report of the Panel, "United States -- Restrictions on Imports of Tuna," DS29/R (June 1994) (hereinafter cited "GATT Rep. DS29/R"). Neither of the panel decisions has been adopted by the GATT counsel or otherwise become effective to date.

## REASONS FOR GRANTING THE PETITION

This Court should review the Court of Appeals' decision for three reasons. First, the determination that the import conditions in Section 1371(a)(2)(C) constitute an "embargo" conflicts with this Court's decision in *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176 (1988), and with decades of previously unquestioned district court authority to construe and enforce

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[9]In its initial opinion, issued March 3, 1994, the Court of Appeals remanded the case with instructions that the lawsuit be dismissed. When Earth Island pointed out in its rehearing petition that the lawsuit included a large number of MMPA issues, many of which had nothing to do with the tuna imports, or restrictions thereon, the Court of Appeals, on June 28, 1994, withdrew its March 3 opinion and issued an amended opinion. Pet. App. at B-1 through B-8. In the June 28 opinion, the Court of Appeals remanded "for further proceedings consistent with this opinion." Pet. App. at B-8.

complex environmental statutory schemes, including with respect to the many statutes that include import conditions among their broad remedial programs.

Second, the approach taken by the Court of Appeals runs counter to Congress' stated purposes behind Section 1581(i)(3). With that provision, Congress acted to clarify the CIT's jurisdiction over areas of particular CIT competence and expertise -- specifically, the resolution of disputes arising out of tariff and international trade laws. Rather than clarify the jurisdictional limits, however, the Court of Appeals' approach will mean that litigants seeking to enforce a myriad of environmental or other statutes having only a peripheral connection with international trade will confront difficult problems figuring out where the district courts' jurisdiction ends and the CIT's jurisdiction begins. Moreover, litigants may well find themselves having to resort to multiple fora to seek enforcement of different portions of the same statute, an inefficient result that also raises the spectre of inconsistent results.

Finally, because the primary purpose of the MMPA is directed toward maintaining the health and stability of the marine ecosystem, rather than international trade, Section 1581(i)(3) does not apply to the MMPA at all. Instead, the MMPA falls within Section 1581(i)(3)'s exception for trade restrictions that relate to public health and safety.

### A. The Court of Appeals Misapplied This Court's Decision in *K Mart* To Hold That the Import Preconditions in Section 1371(a)(2)(C) Constitute an Embargo, Disrupting Previously Unquestioned Federal Question Jurisdiction over Cases Under the MMPA and Other Environmental Statutes That Include Trade-Related Remedies.

The central error below was the Court of Appeals' determination that the import preconditions of Section 1371(a)(2)(C) constitute an "embargo" for purposes of Section 1581(i)(3). This determination conflicts with this Court's

decision in *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176 (1988), which is the leading precedent interpreting Section 1581(i)(3). It also conflicts with decades of unquestioned district court authority under 28 U.S.C. § 1331 to construe and enforce a wide range of environmental and other complex statutory schemes that happen to include, among their broad remedial provisions, some import restrictions.

In *K Mart*, this Court made clear that "not every governmental importation prohibition is an embargo." 485 U.S. at 187. "An embargo is a '[g]overnment order prohibiting commercial trade with individuals or businesses of other nations.'" *Id.* at 184 (quoting *Black's Law Dictionary* 468 (5th ed. 1979)). Thus, as the Court explained, a statute that conditions the importation of gray-market goods on consent of the trademark owner, regulations that bar importation of milk and cream except by a permitholder and except with appropriate labeling, and regulations that mandate inspection of certain meat products before they may be imported, are not embargoes. *Id.* at 184-87. This is so even though such statutes and regulations implicate trade policy.[10]

Applying this "ordinary meaning" approach, Section 1371(a)(2)(C) does not erect a trade embargo. To begin, the provision is not directed to international trade; it is an

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[10]The Court of Appeals appears to have focused in part on the fact that the import restrictions in issue in *K Mart* were triggered by private parties seeking to enforce private rights, rather than governmentally imposed import restrictions. *See* Opinion, Pet. App. at B-6 through B-8 (citing *K Mart*, 485 U.S. at 185). While this was the factual context of *K Mart*, the *K Mart* decision read as a whole does not recognize such a dichotomy. There are multiple examples discussed in *K Mart* of *governmentally* imposed import restrictions – like Section 1371(a)(2)(C) – that do *not* constitute embargoes. *See* 485 U.S. at 186-90.

environmental protection statute. Moreover, nothing in Section 1371(a)(2)(C) prohibits any nation, or any business in any nation, from selling yellowfin tuna and tuna products in this country as such. Instead, much as with the meat inspection regulations discussed in *K Mart*, *see* 485 U.S. at 187, Section 1371(a)(2)(C) merely establishes a condition precedent to importation – specifically, a certification that the exporting country had not imported yellowfin tuna in the previous six months from a nation that could not export the tuna to the United States directly because of its non-compliance with enumerated U.S. fishing standards. 16 U.S.C. § 1371(a)(2)(C). Once an intermediary nation has satisfied the condition, tuna canners can import five, ten or ten thousand tons of tuna from the country. There is, accordingly, no "embargo or other quantitative restriction" within the meaning of the CIT jurisdiction statute.[11]

The fact is that federal district and appellate courts have historically played an important role in enforcement of the MMPA's multiple and varied remedies to protect dolphins and

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[11]In *K Mart*, this Court termed "unnatural" an attempt to characterize import prohibitions on uninspected meat as an embargo. 485 U.S. at 187. Merely because the Customs Service can prohibit entry of uninspected meat, these import limitations do not "magically become an embargo of uninspected (but not necessarily tainted) meat[.]" *Id.* Section 1371(a)(2)(C)'s requirement of certifications from intermediary nations before yellowfin tuna can be imported, is no more of an embargo than the meat inspection requirements discussed by the Court in *K Mart*. The MMPA imposes no *quantitative* restrictions (including an absolute limit of zero, as a true embargo restriction would).

marine mammals.[12] The Court of Appeals' Opinion would transfer this important role to the CIT and the United States Court of Appeals for the Federal Circuit. *See* 28 U.S.C. § 1295(a)(5).[13]

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[12]The Ninth Circuit Court of Appeals alone has rendered at least five decisions over the past decade construing different MMPA provisions. *See United States v. Hayashi*, 5 F.3d 1278 (9th Cir. 1993) (holding that steps taken to deter porpoises from eating fish off fisherman's line did not support criminal conviction for taking porpoises "knowingly"); *Earth Island Institute v. Mosbacher*, 929 F.2d 1449 (9th Cir. 1991) (affirming injunction directing enforcement of tuna import conditions on primary nations); *United States v. Clark*, 912 F.2d 1087 (9th Cir. 1990) (upholding constitutionality of Alaskan natives' subsistence exemption), *cert. denied*, 498 U.S. 1037 (1993); *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668 (9th Cir. 1988) (reversing preliminary injunction prohibiting female observers); *Balelo v. Baldrige*, 724 F.2d 753 (9th Cir.) (*en banc*) (upholding constitutionality of observer requirement), *cert. denied*, 476 U.S. 1252 (1984).

[13]Of course, courts in the Ninth Circuit are not the only federal district and appellate courts that have routinely exercised jurisdiction to construe the MMPA and other statutes that include import restrictions of various kinds. *See, e.g., Sweet Home Chapter of Communities for a Great Oregon v. Babbit*, 17 F.3d 1463 (D.C. Cir. 1994) (Interior Department regulations promulgated under the Endangered Species Act); *Strong v. United States*, 5 F.3d 905 (5th Cir. 1993) (MMPA regulations concerning the feeding of wild dolphins); *Mississippi Poultry Ass'n v. Madigan*, 992 F.2d 1359 (5th Cir.) (challenge to agency regulations relating to Section 17(d) of the Poultry Products Inspection Act, 21 U.S.C. § 466(d), which prohibits importation of poultry unless it is subjected to the same inspection procedures to which U.S. poultry is subject), *opinion amended on other*

But the Court of Appeals' decision promises an effect far broader than just MMPA enforcement. It will also oust federal district and appellate courts from their traditional role in the enforcement of a variety of *other* critical environmental statutes whose remedial schemes also include importation preconditions that may be classified, under the Ninth Circuit's logic, as embargoes. Among the many statutes that include import restrictions of this sort are the:

- Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-1882 (import restrictions in Section 1825);

- Pelly Amendment to the Fisherman's Protective Act of 1967, 22 U.S.C. § 1978 (import restrictions in Section 1978(a)(4));[14]

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*grounds*, 9 F.3d 1113 (5th Cir.), *petition for rehearing en banc granted*, 9 F.3d 1116 (5th Cir. 1993); *National Coalition Against Misuse of Pesticides v. E.P.A.*, 867 F.2d 636 (D.C. Cir. 1989) (challenge to EPA decision to permit continued use of existing stocks of certain pesticides, the importation of which were banned by the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y); *Citizens To End Animal Suffering and Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45 (D. Mass. 1993) (MMPA challenge to proposed dolphin transfer from aquarium site to navy site) (case dismissed on standing grounds); *Bays' Legal Fund v. Browner*, 828 F. Supp. 102 (D. Mass. 1993) (MMPA challenge to construction of sewage release system); *Animal Protection Inst. of Am. v. Mosbacher*, 799 F. Supp. 173 (D.D.C. 1992) (challenge to a permit issued to allow importation of marine mammals).

[14]The certification procedures of the Pelly Amendment were reviewed by this Court in *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986). *See infra* note 15.

- Migratory Bird Treaty Act of 1916, 16 U.S.C. §§ 701-718 (import restrictions in Section 703);
- Northern Pacific Halibut Act of 1982, 16 U.S.C. §§ 773-773k (import restrictions in Section 773e(5));
- South Pacific Tuna Fishing Act of 1988, 16 U.S.C. §§ 973-973r (import restrictions in Section 973c(a)(13));
- Whaling Convention Act of 1949, 16 U.S.C. §§ 916-916*l* (import restrictions in Section 916c);
- Tuna Convention Act of 1950, 16 U.S.C. §§ 951-9621 (import restrictions in Section 957(c));
- Atlantic Tuna Convention Act of 1975, 16 U.S.C. §§ 971-971i (import restrictions in Section 971e(d));
- Eastern Pacific Tuna Fishing Act of 1984, 16 U.S.C. §§ 972-972h (import restrictions in Section 972f(a)(6));
- Pacific Salmon Treaty Act of 1985, 16 U.S.C. §§ 3631-3644 (import restrictions in Section 3637); and
- Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (import restrictions in Section 1538).

*See also* statutes cited *supra* in note 13.[15]

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[15]The issue presented here appears to be one of first impression in all of the Courts of Appeals, save the United States Court of Appeals for the Ninth Circuit. While this appeal was pending, the Ninth Circuit held that the import restrictions in the Endangered Species Act constituted embargo provisions for Section 1581(i)(3) purposes, and so affirmed dismissal of a portion of a lawsuit brought to compel government enforcement of import restrictions on shrimp harvested in a manner that kills sea turtles. *See Earth Island Institute v. Christopher*, 6 F.3d 648 (9th Cir. 1993) (*"Sea Turtles"*).

Aside from *K Mart*, this Court has addressed the issue presented only inferentially, but again in a manner inconsistent with the Court of Appeals' approach here and in *Sea Turtles*. In *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221

The Court of Appeals offers no justification for this result, which is particularly troubling in light of the absence of any particular expertise in the CIT and the Federal Circuit in environmental protection, and, indeed, these courts' acknowledged expertise elsewhere. *See* H.R. Rep. No. 1235, 96th Cong., 2d Sess. 49 (1980) (hereinafter cited "H.R. Rep. No. 1235"), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3760 (CIT's expertise extends to "questions concerning classification, valuation or markings"). In *K Mart*, this Court expressly cautioned that in enacting Section 1581(i)(3), Congress did *not* intend to give the CIT jurisdiction over matters outside its predecessor's expertise:

> Nor is there any indication (aside from Petitioner's strained reading of the term "embargo") that Congress wished the new institutions [the CIT and Federal Circuit] to acquire expertise in the area in which its predecessors had none.

485 U.S. at 189. Yet this is precisely the result of the Court of Appeals' Opinion.

This petition thus raises significant policy issues as well, in particular the extent to which international trade issues and concerns will be permitted to subsume environmental legislation. The GATT decisions concerning the import conditions of Section 1371(a)(2) indicate that, in the view of the panels that decided them, environmental regulations must yield to unrestricted free trade. *See generally* GATT Rep. DS29/R. But while even final GATT decisions do not "trump domestic

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(1986), this Court accepted jurisdiction over claims to enforce statutory conditions to fishing in U.S. fisheries even though the statute also provides for an import ban on fish products from countries whose fishing practices threaten endangered species. *See* 22 U.S.C. § 1978. The Court did so without questioning the district court's jurisdiction over these claims despite the presence of such a ban in the statutory scheme. *Id.* § 1978(a)(4).

legislation,"[16] the piecemeal relegation of portions of important environmental statutes to specialized U.S. trade courts might. The District Court in this matter has presided over six years of litigation concerning numerous complex questions under different MMPA provisions. The government's suggestion, years into the case, that the dispute ought to be bifurcated, and important parts of the MMPA construed by the former Customs Court, trivializes the importance not just of the MMPA, but of numerous environmental and other statutes that historically have been interpreted and enforced by the district courts. This was not Congress' intent when it enacted 28 U.S.C. § 1581(i).

**B. The Court of Appeals' Approach Conflicts with the Legislative Purpose Behind Section 1581(i)(3), and Promises Litigants Uncertainty as to Where a Lawsuit Should Be Brought and Piecemeal Litigation in Multiple Fora, with the Possibility of Inconsistent Results.**

The decision below also merits review because if it is permitted to stand, it promises judicial diseconomies both through collateral litigation over the proper forum for resolution of particular issues and the need for litigants to prosecute the same basic lawsuit in more than one court. Quite apart from the difficulties this creates for the judicial system, the approach conflicts with the legislative purpose of Section 1581(i)(3).

The legislative history of the Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727, makes clear that Section 1581(i)(3) was enacted to correct inequities that resulted from conflicting judicial decisions relating to district court jurisdiction to consider classification and valuation disputes concerning

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[16] *Mississippi Poultry Ass'n, Inc. v. Madigan*, 992 F.2d 1359, 1366 (5th Cir. 1993); *accord Algoma Steel Corp. v. United States*, 865 F.2d 240, 242 (Fed. Cir. 1989) ("[s]hould there be a conflict [between a U.S. law and GATT], the United States legislation must prevail").

imports to this country. *See* H.R. Rep. No. 1235 at 19, 1980 U.S.C.C.A.N. at 3730-31.[17] Because of the limited powers of the CIT's predecessor (the Customs Court) before Section 1581(i), litigants would attempt to have such disputes heard in the district courts, where they had an opportunity to obtain full relief if the court accepted jurisdiction. There were, however, inconsistent court decisions about district court jurisdiction to hear such matters; and a dismissal for want of jurisdiction, in many cases, effectively precluded a judicial determination of the case. *See generally id.* at 18-20, 1980 U.S.C.C.A.N. at 3729-32.

Section 1581(i) thus was intended "to eliminate the confusion that currently exists as to the demarcation between the jurisdiction of the district courts and the Court of International Trade" to ensure that litigants, who had previously found themselves caught either without a remedy for classification and valuation disputes, or without a court in which to enforce their remedy, had their disputes "heard on the merits." *Id.* at 47, 1980 U.S.C.C.A.N. at 3759.

The dispute here does not concern classification or valuation issues, however; and the litigants here did not lack an adequate forum. Far from simplifying anything, the Court of Appeals' construction of Section 1581(i)(3) will, if permitted to stand, significantly complicate litigation that is generally unrelated to international trade, such as the lawsuit here.

This action has involved disputes over a large number of MMPA provisions, only a portion of which have anything to do with international trade. The result under the Court of Appeals' approach is that trade-related issues will be heard in one forum,

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[17]The legislative history is devoid of any reference to situations like this one, where litigants are working through the courts to enforce statutes with a primary purpose unrelated to international trade, but with some trade-related remedies to help ensure that domestic standards will have some meaning.

the CIT, while disputes relating to other parts of the same statute will be considered by the district courts.[18] This is problematic at several levels.

*First*, it is very difficult to parse out what pieces of these statutes are trade-related and what pieces are not, and it sometimes depends on the context in which the dispute arises. For example, 16 U.S.C. § 1374(h) grants a general permit to the American Tunaboat Association to take marine mammals as an incident to yellowfin tuna fishing in the ETP under certain specified conditions. Because Section 1374(h) on its face relates to tuna fishing by the domestic fleet, one presumes that the district courts have the authority to construe and enforce it even under the Court of Appeals' decision.

There are contexts, however, in which portions of Section 1374(h) can have an indirect trade impact. For instance, 16 U.S.C. § 1371(a)(2)(B) links the ability to import tuna to the United States to whether an exporting country has a regulatory program restricting the taking of marine mammals as an incident to tuna fishing that is "comparable" to the regulatory program

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[18]This is precisely the approach the Court of Appeals took in the *Sea Turtles* litigation. In that case, plaintiffs brought two claims under the Endangered Species Act, 16 U.S.C. §§ 1531-1544, providing for protection of sea turtles from the harmful effects of shrimp trawling: (1) that the government was not properly enforcing limitations on shrimp importation, including a ban on importation for nations whose fishing techniques harmed sea turtles; and (2) that the government had not initiated treaty negotiations to protect sea turtles as allegedly required by the statute. *See Sea Turtles*, 6 F.3d at 650. Only the first claim was dismissed on jurisdiction grounds, the Court of Appeals holding that the import limitations underlying this claim constituted an "embargo" within Section 1581(i)(3) that could be heard only by the CIT. *Id.* at 652. There was no issue of the district court's subject matter jurisdiction to hear the second set of claims, however. *Id.* at 653.

here. The provision also requires the foreign fleet's rate of incidental dolphin kill to be "comparable" to the kill rate by the domestic fleet.[19] The Court of Appeals' decision leaves unclear what court will construe Section 1374(h) to determine what is "comparable" for Section 1371(a)(2)(B) purposes. It leaves unclear whose construction of the provision will be authoritative.

This difficulty is especially acute for a provision like Section 1374(h), which has been litigated extensively in the District Court in this action, because 16 U.S.C. § 1374(d)(6) specifically provides for judicial review in the *district courts* of disputes over permits authorizing the importation or taking of any marine mammal.[20]

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[19]The comparability requirements are actually quite complex, involving application of five additional subparagraphs of Section 1371(a)(2)(B) that themselves involve application of many other provisions of the statute. Disputes over the proper application of these provisions have been the focus of a significant portion of the litigation in this action before the District Court.

[20]Another possible illustration of this jurisdiction-boundary problem is now pending before the Court of Appeals. As mentioned above, in note 6, the District Court earlier this year granted Earth Island's request for an injunction, pursuant to 16 U.S.C. § 1374(h), barring the *domestic* tuna fishing fleet from setting nets on depleted dolphin species. But because of the manner in which the comparability standards, which govern another country's ability to export yellowfin tuna to the United States, work, these limitations on the domestic fleet have an indirect impact on international trade. *See* 16 U.S.C. § 1371 (a)(2)(B)(ii). It is difficult to believe that such an indirect impact could render the domestic regulation an "embargo," yet the government has appealed this very point. In fact, the government requested that the Court of Appeals stay proceedings in the depleted species appeal pending this Court's resolution of this

The Court of Appeals' decision invites disputes over whether particular pieces of a lawsuit should be presented to the CIT or to the district courts. As a result, it promises confusion, collateral litigation, delay in the resolution of *bona fide* disagreements and additional expense both to the litigants and to the judicial system.

*Second*, these jurisdictional difficulties may well arise in the context of a single lawsuit. As mentioned in footnote 18, this occurred in the *Sea Turtles* lawsuit, and it has now happened here. The Court of Appeals' decision, coming as it did six years into a lawsuit that has required and continues to require court consideration of multiple provisions of the MMPA, has obvious negative implications for judicial efficiency, cost-effective resolution of the disputes, finality and consistency. Under the Court of Appeals' Opinion, Earth Island must now travel across the country, to a forum unfamiliar with this case and without expertise with this area generally or with the MMPA in particular, to continue one portion of this lawsuit, while the remainder of the case will remain before the District Court. The result is nonsensical.

*Third*, the prospect of litigating pieces of the same dispute in multiple fora all but ensures inconsistency in the results. The statutory scheme in issue here and in many environmental cases is a complex one that includes difficult questions of statutory interpretation. The need for consistency in general is obvious to help resolve existing disputes and to prevent disputes in the future. Moreover, the need for consistency in resolving multiple issues within a single lawsuit cannot be gainsaid. Yet the Court of Appeals' decision is calculated to frustrate this basic principle.

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petition. The stay was denied. Thus, events in this very case subsequent to the Ninth Circuit's decision, demonstrate the decision's propensity to encourage collateral litigation wholly unrelated to the merits.

Far from providing the certainty that Congress sought when it enacted Section 1581(i), the Court of Appeals' Opinion promises confusion, uncertainty, inconsistency and a lack of finality. This Court should review the Court of Appeals' Opinion to remedy these serious infirmities.

### C. The Import Conditions of Section 1371(a)(2)(C) Have Nothing To Do with International Trade and Are Instead Provisions Intended To Protect the Marine Ecosystem; As Such, Section 1581(i)(3) Does Not Apply Here.

Even if the import conditions of Section 1371(a)(2)(C) were properly seen as an embargo, the jurisdictional strictures of Section 1581(i)(3) do not apply. Under the statute, the CIT has exclusive jurisdiction only when the embargo exists "for reasons *other than* the protection of public health and safety." 28 U.S.C. § 1581(i)(3) (emphasis added).

The congressional findings and policy statements enacted as part of the MMPA, together with its legislative history, establish that the statute has nothing to do with issues of international trade. Instead, Congress recognized the role of marine mammals as "significant functioning element[s] of the marine ecosystem." 16 U.S.C. § 1361(2); *see also id.* §§ 1361(6), 1411(a)(1), 1411(a)(2), 1411(b)(1). Noting that certain species and population stocks of marine mammals were in danger of extinction or depletion as a result of human activity, *id.* § 1361(1), and that marine mammals were "resources of great international significance, esthetic and recreational as well as economic," Congress set as the MMPA's "primary objective" to "maintain the health and stability of the marine ecosystem." *Id.* § 1361(6).

These statements of legislative purpose place the import preconditions of Section 1371(a)(2)(C) within the public health and safety exception to Section 1581(i)(3). Although the MMPA is directly concerned with the health and safety of marine mammals and the marine ecosystem, protection of the ecosystem very obviously promotes human health and safety.

*Cf.* 42 U.S.C. § 4331 (congressional declaration of national environmental policy, recognizing, *inter alia*, "the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man"). As such, the public health and safety exception of Section 1581(i)(3) should include within its scope statutes primarily concerned with maintaining or improving the environment generally, whether or not their direct focus is on human health and safety.

Furthermore, interpreting the exception in this manner is consistent with the legislative history of Section 1581(i)(3). As discussed above, the primary purpose of the jurisdictional grant in Section 1581(i) was to clarify the scope of CIT jurisdiction and to remedy the difficulty that some litigants with international trade problems had experienced finding an appropriate forum to hear their disputes over, for example, classification and valuation matters. *See supra* Part B. The public health and safety exception to sub-subparagraph 3 was added specifically because of concern that otherwise, some disputes that were in reality unrelated to international trade would end up before the CIT when they were more appropriately matters that should be heard by the district courts.

While the legislative history does not address the issue as such, Congress' commentary on the health and safety exception is instructive. According to the House Report, the American Importers Association expressed concern that Section 1581(i) as introduced, without the public health and safety exception,

> could have been interpreted to permit the [CIT] to assert jurisdiction over civil actions involving the application of the Federal Food, Drug and Cosmetics Act or the Toxic Substances Control Act to imported merchandise. *AIA believed these actions did not involve questions of classification, valuation or rate of duty* but rather questions of public health and safety. As such, it was AIA's position that those questions should be treated the same whether a court is dealing with domestic or imported goods *and more*

> *appropriately should come within the jurisdiction of the district courts.*

H.R. Rep. No. 1235 at 47, 1980 U.S.C.C.A.N. at 3759 (emphasis added). The exception accordingly was added.

The MMPA issues raised here likewise have nothing to do with classification, valuation or rates of duty. They are likewise matters that traditionally have been, and more appropriately are, considered by the federal district courts. The Court of Appeals' holding to the contrary is incorrect and should be reviewed by this Court.

## CONCLUSION

The Court of Appeals' decision conflicts with prior decisions of this Court, with the legislative intent of Congress and with simple logic. The piecemeal adjudication of claims in multiple fora is inefficient, expensive and often inconsistent. For these and the other foregoing reasons, this Court should grant this petition for Writ of Certiorari.

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